No. 88-1720

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

EDWARD J. WILSMANN,

Petitioner,

v.

THE UPJOHN COMPANY

and

UPJOHN HEALTH CARE SERVICES, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

CHARLES LISTER*
STEVEN F. REICH
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

THOMAS G. PARACHINI
MILLER, CANFIELD, PADDOCK & STONE
Suite 100
1400 N. Woodward Ave.
P.O. Box 2014
Bloomfield Hills, Michigan 48303-2014
(616) 381-7030

Attorneys for Respondents

* *Counsel of Record*

May 24, 1989

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QUESTION PRESENTED

Whether petitioner is entitled to reconsideration, under the guise of a new petition for certiorari, of the Court's determination in 1986 not to review the Sixth Circuit's 1985 decision that respondents were entitled to judgment n.o.v.

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Pursuant to Rule 22.1 of the Rules of the Court, Respondents The Upjohn Company and Upjohn Health Care Services, Inc. (collectively "Upjohn")[1] oppose the

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[1] In accordance with Rule 28.1, respondents state that Upjohn Health Care Services, Inc., is a wholly-owned subsidiary of The Upjohn Company, which in turn has no parent company. The two companies have various subsidiaries and affiliates that are not wholly-owned, but most of those exist outside the United States. Within the United States, such companies include Chugai Upjohn, Inc., Cobb-Vantress, Inc., North Coast Hospital Home Care, Inc. and CARETEC, Inc.

petition for a writ of certiorari filed by Edward J. Wilsmann.[2]

STATEMENT OF THE CASE

This is the second occasion on which Wilsmann has brought this case to the Court. Indeed, it is the second time Wilsmann has argued to the Court that the decision in 1985 of the United States Court of Appeals for the Sixth Circuit should be reversed because Upjohn assertedly did not adequately preserve the issue of the sufficiency of the evidence at the trial of this matter held in 1983. Wilsmann's statement of the case is inaccurate and incomplete, but the relevant facts are conveniently summarized in the two unanimous opinions of the Sixth Circuit. *See* the Appendix to the Petition ("Pet. App.") at A3 and A18. The following statement therefore includes only a brief description of the lengthy record.

Wilsmann is an experienced accountant and businessman who in 1969 was president of Homemakers, a small company then selling franchises for the provision of home health care. By Wilsmann's own estimate, the company was "broke."[3] When Wilsmann was unable to arrange a public offering of Home-

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[2] Wilsmann's petition includes "Homemakers, Inc." as a respondent. Homemakers was the company's name in 1969 at the time of its acquisition by Upjohn, but its name has subsequently been changed and its present name is Upjohn Health Care Services, Inc.

[3] Trial transcript ("Tr.") 207.

makers' stock, he negotiated the company's acquisition by Upjohn. The parties first contemplated an arrangement under which Wilsmann would have been given an investment interest in Upjohn's new Homemakers' subsidiary, which Upjohn would have had a later option to purchase. This proposal was abandoned after Upjohn was compelled to lend large sums of money to satisfy Homemakers' urgent financial needs. Later in 1969, the parties instead adopted a different arrangement under which Homemakers became a wholly-owned subsidiary of Upjohn and Wilsmann's proposed investment interest was eliminated. The terms of the acquisition were embodied in a detailed written agreement expressly described as the parties' "entire" agreement, superseding "all prior agreements and understandings."[4] Wilsmann executed the agreement on behalf of Homemakers.

The parties also agreed that Wilsmann would become an employee of the new subsidiary. Upjohn and Wilsmann entered into a written employment contract that again represented their "entire" agreement, expressly superseding all prior understandings.[5] In addition to salary and other benefits, the employment contract permitted Wilsmann to earn employment bonuses contingent upon the sufficiency of Homemakers' post-acquisition earnings, as determined by an eligibility formula set forth in the contract.[6]

Wilsmann brought this action in 1977, alleging violations of the federal securities laws and breach of contract. His claims were vague and inconsistent, but

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[4] Plaintiff's Trial Exhibit 2 at 26.

[5] Plaintiff's Trial Exhibit 28 at 6-7.

[6] Pet. App. at A24 n.13.

included allegations that Upjohn had breached the employment contract by failing to pay employment bonuses and had violated the securities laws by failing to make a "back-end" payment assertedly promised to him orally in 1969. At trial, Upjohn moved unsuccessfully for a directed verdict, based in part upon the insufficiency of the evidence. The jury returned a verdict for Wilsmann regarding his claim under the securities laws, but did not reach his contract claims. Following trial, Upjohn filed a timely motion for judgment notwithstanding the verdict. Upon appeal, Upjohn argued in part that the trial court erred in denying a directed verdict and judgment n.o.v. because of the insufficiency of the evidence.

The Sixth Circuit held unanimously that the trial court erred in not granting judgment n.o.v., and remanded the case for further consideration of Wilsmann's contract claims. The court held that Wilsmann's unsupported testimony regarding the alleged oral promise was "in conflict," requiring the jury to indulge in "sheer speculation." Pet. App. A36. It emphasized that Wilsmann's contentions were not only "totally implausible" but "also in conflict each with the other." *Id.* Accordingly, the court of appeals held that a jury "could not within reason" have found that fraud occurred. *Id.* Wilsmann sought rehearing *en banc*, arguing for the first time that Upjohn had not properly preserved the issue of the sufficiency of the evidence for appellate review. After further briefing addressed to the preservation issue, the Sixth Circuit denied rehearing.

Wilsmann thereupon filed a petition for a writ of certiorari in this Court, again arguing in part that Upjohn failed to preserve the issue of the sufficiency

of the evidence. The Court denied the petition. *Wilsmann* v. *The Upjohn Co.*, 476 U.S. 1171 (1986).

During the pendency of the petition, the parties filed cross-motions for summary judgment in the district court regarding Wilsmann's remaining state law contract claims. On September 3, 1986, Wilsmann filed a Second Supplement to his summary judgment motion attaching an affidavit reciting that one of his counsel had overheard one of Upjohn's counsel say in a luncheon conversation at a restaurant[7] that he did not believe the issue of the sufficiency of the evidence had been adequately preserved.[8]

On February 20, 1988, the district court granted summary judgment to Upjohn on Wilsmann's remaining contract claims. Pet. App. A12. The court held that this result was required by the Sixth Circuit's 1985 opinion, but that, in any event, Wilsmann's claims were foreclosed by Michigan's Statute of Frauds. Pet. App. A13-16.

On January 9, 1989, the Sixth Circuit unanimously affirmed the district court's judgment. Pet. App. A3.

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[7] Wilsmann's counsel was apparently seated at a different table in the restaurant, and was not himself a participant in the alleged discussion.

[8] In January 1987, while the cross-motions for summary judgment were pending before the district court, and more than six months after this Court denied his petition for a writ of certiorari, Wilsmann filed for reconsideration of the Sixth Circuit's denial of his motion for rehearing *en banc*. The motion for reconsideration was also based on the comments allegedly made at the restaurant by Upjohn's counsel. The Sixth Circuit denied the motion in an order dated February 16, 1987. Thereafter, Wilsmann filed a motion to recall the Sixth Circuit's mandate in the case based again on the alleged luncheon conversation. The Sixth Circuit denied that motion on March 9, 1987.

The court reiterated its previous holding that Wilsmann's claims are "totally implausible" and "self-conflicting," *id.* at A7, and affirmed the district court's judgment that, in any case, his claims are barred by the Michigan Statute of Frauds. *Id.* at A7-9. This petition followed.

REASONS WHY THE WRIT SHOULD BE DENIED

Certiorari should plainly be denied. Wilsmann does not challenge either the district court's award of summary judgment or the Sixth Circuit's 1988 decision affirming that award. Both decisions were independently based on requirements of Michigan law, and there is no claim that those requirements were erroneously applied. Instead, Wilsmann claims that his counsel's eavesdropped account of an alleged luncheon conversation three years after the trial requires the Court once again to consider the Sixth Circuit's 1985 decision that respondents were entitled to judgment n.o.v. In essence, he seeks reconsideration of the Court's denial in 1986 of his first petition for a writ of certiorari.

In the first appeal to the Sixth Circuit, Upjohn argued vigorously that the evidence at trial was insufficient to support the jury's verdict. Wilsmann did not claim that the issue had not been adequately preserved until he petitioned for rehearing of the Sixth Circuit's decision. In response, Upjohn drew the Sixth Circuit's attention to the relevant portions of the trial transcript, including comments by counsel and by the

trial court.[9] After consideration of the issue, the court unanimously denied rehearing, noting that "no judge of this Court" had even "requested a vote . . . ."[10] The preservation issue was then fully presented to this Court by Wilsmann in his unsuccessful 1986 petition for a writ of certiorari.

There is no basis for further review. What one of Upjohn's counsel might have said in a luncheon conversation three years after the trial is simply irrelevant. Even if it were assumed that plaintiff's counsel accurately overheard the conversation in 1986, the only relevant fact is what actually occurred in 1983 as reflected in the trial transcript. The Sixth Circuit had the full trial record before it, and, after consideration of the parties' rehearing memoranda addressed specifically to the preservation issue, rejected Wilsmann's claim. This Court left the Sixth Circuit's decision undisturbed in 1986, and there is no occasion now to reconsider that result.

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[9] Tr. 889-990, 918, 1277. *See also* Opposition of The Upjohn Co., *et al.*, Wilsmann v. The Upjohn Co., No. 85-1712, at 7-9 (1986).

[10] *See* Pet. App. A22 in the petition for a writ of certiorari in Wilsmann v. The Upjohn Co., et al., No. 85-1712 (1986).

CONCLUSION

No substantial issue of federal law exists or is presented here. There is no occasion either to review the Sixth Circuit's 1988 decision or to reconsider this Court's denial of certiorari in 1986.

Respectfully submitted,

CHARLES LISTER*
STEVEN F. REICH
Covington & Burling
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

THOMAS G. PARACHINI
Miller, Canfield, Paddock & Stone
Suite 100
1400 N. Woodward Ave.
P.O. Box 2014
Bloomfield Hills, Michigan 48303-2014
(616) 381-7030

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* Counsel of Record

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